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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

V.

GREGORY ALLEN PETTY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER A HABEAS PETITIONER WHO CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL MUST ALLEGE HOW HE WAS PREJUDICED BY COUNSEL'S PERFORMANCE.

II. WHETHER A FEDERAL APPELLATE COURT SHOULD CONSIDER UNEXHAUSTED ISSUES RAISED FOR THE FIRST TIME ON APPEAL BY A HABEAS PETITIONER-APPELLANT AND REMAND TO ALLOW AMENDMENT OF THE PETITION TO INCLUDE THOSE ISSUES.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES O.L. McCotter, Director, Texas Department of Corrections, Petitioner[1] herein, by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on January 3, 1986, and is attached hereto as Appendix F; the order denying rehearing is attached as

1. For clarity, petitioner in this Court and respondent below, O.L. McCotter, Director, Texas Department of Corrections, will be referred to as the state, the real party in interest. Respondent in this Court and petitioner below, Gregory Allen Petty, will be referred to as Petty.

Appendix G. *Petty v. McCotter*, 779 F.2d 299, (5th Cir. 1986). The federal district court's order of dismissal and final judgment are attached as Appendices D and E, and the underlying magistrate's report and recommendation is attached as Appendix C. *Petty v. McKaskle*, No. CA5-84-34 (N.D. Tex.) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1986. A timely filed suggestion for rehearing *en banc* was denied on March 4, 1986. This petition for writ of certiorari if filed within thirty days after final judgment in the court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 2(c), 28 U.S.C. fol. § 2254 provides, in pertinent part, as follows:

> The petition . . . . shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified.

Rule 4, 28 U.S.C. fol. § 2254 provides, in pertinent part, as follows:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the

> period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 8(a), 28 U.S.C. fol. § 2254 provides, in pertinent part, as follows:

> If the petition is not dismissed at a previous stage in the proceedings, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required.

Rule 9(b), 28 U.S.C. fol. § 2254 provides as follows:

> A second or successive petition may be dismissed if the judge finds that if fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

The state has lawful custody of Petty pursuant to a judgment and sentence of the 99th District Court of Lubbock, County, Texas, in Cause No. 19,914, styled *The State of Texas v. Greg Allen Petty.* Petty was charged by indictment with the felony offense of aggravated robbery, to which he entered a plea of not guilty. After a jury trial, Petty was found guilty and his punishment was set at fifty years imprisonment in the Texas Department of Corrections. Sentence was imposed on September 20, 1979. The Texas Court of Criminal Appeals affirmed on April 17, 1983, in an unpublished *per curiam* opinion. *Petty v. State,* No. 64,750. Petty has filed one state application for writ of habeas corpus, and it was denied by the Court of Criminal Appeals on October 5, 1983. *Ex parte Petty,* No. 10,573.

Petty then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas,

Lubbock Division. *Petty v. Procunier,* No. CA5-84-034. The United States Magistrate to whom the case was referred made findings of fact and conclusions of law and recommended that relief be denied. The district court adopted the magistrate's findings and recommendation and ordered the case dismissed on May 14, 1984.

Petty perfected an appeal to the Court of Appeals for the Fifth Circuit. *Petty v. McCotter,* No. 84-1488. After Petty filed his *pro se* brief and the state filed a brief in response, the court granted Petty's motion for appointment of counsel, and appointed counsel thereafter filed a supplemental brief. The *pro se* brief filed by Petty raised two specific allegations of ineffective assistance of counsel which were not raised in the district court. First, Petty for the first time complained that trial counsel should have investigated why he was missing several teeth at the time of his guilty plea. Second, Petty asserted that trial counsel failed to investigate the possible defense of insanity. *See* Appendix F at 3-4. The court below addressed the first of these grounds, finding it to be meritless. *Id.* at 4. As to the second allegation, however, the Fifth Circuit remanded. First, the court below held that "*Strickland [v. Washington,* 466 U.S. 668 (1984)] requires that prejudice be proved, not pleaded." *Id.* at 5. In the alternative, the court held that Petty should be allowed to amend his petition in the district court to raise his new, unexhausted allegations of ineffective assistance of counsel.

> We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations, however, indicates that he would raise them in the district court if he were given the opportunity to do so. Therefore, even if a pro se petitioner is required to allege specific prejudice that he must eventually prove, Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

Id. at 4-5.

The state timely filed a suggestion for rehearing *en banc* raising the two questions presented in the instant petition, and

it was summarily denied. *See* Appendix G. On March 19, 1986, the Fifth Circuit granted the state's motion to stay the mandate to and including April 3, 1986.

SUMMARY OF ARGUMENT

There are special and important reasons for granting the writ. In holding that a federal habeas petitioner need not plead prejudice as part of his claim of ineffective assistance of counsel, the Fifth Circuit completely ignored this Court's decision in *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985). Because the holding of the court below is in irreconcilable conflict with *Hill*, this Court should grant certiorari and summarily remand for reconsideration in light of *Hill*.

Of even greater significance, however, is the Fifth Circuit's radical departure from established appellate procedure in its treatment of the issues Petty raised for the first time on appeal. By remanding to allow Petty to amend his petition to include unexhausted issues raised for the first time in that court, the Fifth Circuit ignored the rule that issues first presented on appeal ordinarily will not be considered. If its opinion is allowed to stand, it will profoundly affect the manner in which habeas petitions are handled in that circuit. Lacking prescience, the district courts will not be able to foresee what new claims may be raised on appeal. The Fifth Circuit's opinion, by remanding to allow for the inclusion of new issues on appeal, robs the district courts' judgments of their finality. This holding also works unfairly in that it deprives the state of an opportunity to plead abuse of the writ under Rule 9(b), 28 U.S.C. fol. §2254 in response to either an amended application or a second application filed by Petty.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

There are two profoundly important reasons why this Court should review the judgment of the court below. First, as

discussed in Part II, *infra*, the Fifth Circuit's interpretation of the pleading requirements of Rule 2(c), 28 U.S.C. fol. § 2254 and *Strickland v. Washington*, 466 U.S. 668 (1984) is in direct conflict with *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985). This Court should not countenance the Fifth Circuit's disregard of this controlling precedent.

Second, as discussed in Part III, *infra*, the Fifth Circuit's treatment of Petty's new issues on appeal will have a very significant impact on the manner in which federal habeas petitions are processed in the district courts of that circuit. Under the Fifth Circuit's holding, the district courts' judgments are robbed of any semblance of finality. Further, and equally as important, the Fifth Circuit's rule provides habeas petitioners with an unprecedented means to circumvent the successive petition doctrine of Rule 9(b), 28 U.S.C. fol. 2254.

II.

HILL V. LOCKHART, _____U.S._____, 106 S.CT. 366 (1985) REQUIRES THAT A HABEAS PETITIONER CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL SPECIFICALLY PLEAD PREJUDICE.

Strickland v. Washington, 466 U.S. 668 (1984) teaches that a habeas petitioner who claims that he received the ineffective assistance of counsel has the burden of demonstrating both that counsel's performance was deficient and that the deficient performance prejudiced the defense. The Fifth Circuit's opinion in this cause held that "*Strickland* requires that prejudice be proved, not pleaded." *See* Appendix F at 5. This holding conflicts with *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985). *Hill* applied the two-prong test of *Strickland* to ineffective assistance claims in the context of a guilty plea and held that a habeas petitioner who claims a sixth amendment violation must plead both prongs:

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. We find it unnecessary to determine whether erroneous advice by

> counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no specific circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.
>
> Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Srickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim.

Id. at_____, 106 S.Ct. at 371 (record citation omitted). The holding of the court below cannot be squared with *Hill.*

Further, there are very important practical considerations which support the *Hill* requirement that a federal habeas petitioner affirmatively plead the manner in which he was prejudiced by the acts or omissions of allegedly ineffective counsel. Federal habeas procedures contemplate the district courts acting as a "screen" for the many applications filed each year.[2] Thus, Rule 2(c), 28 U.S.C. fol. § 2254, requires that the petitioner support his legal claims with factual allegations, and Rule 4 provides that the district court may summarily dismiss a peti-

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2. "The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than we are, and to their sound discretion must be left in very large part the administration of federal habeas corpus." *Townsend v. Sain,* 372 U.S. 293, 313 (1963).

tion which on its face shows that the petitioner is not entitled to relief. Similarly, the district court need not conduct an evidentiary hearing under Rule 8(a) unless there are disputed, material facts which cannot be resolved on the record. *See Townsend v. Sain*, 372 U.S. 293, 312-320 (1963). The holding of the court below disserves these substantial policies by poking a hole in the "screen" created by the pleading requirements of Rule 2(c). This Court should grant certiorari and summarily remand to the Fifth Circuit for reconsideration in light of *Hill*.

III.

BY CONSIDERING UNEXHAUSTED ISSUES RAISED FOR THE FIRST TIME ON APPEAL AND REMANDING TO ALLOW THE HABEAS PETITIONER-APPELLANT TO AMEND HIS PETITION TO INCLUDE THOSE ISSUES, THE OPINION OF THE COURT BELOW UNFAIRLY DEPRIVES THE STATE OF AN OPPORTUNITY TO PLEAD ABUSE OF THE WRIT UNDER RULE 9(B), 28 U.S.C. FOL. §2254.

A. *The Fifth Circuit's disposition of Petty's new claims constitutes a radical departure from settled appellate procedure.*

It is a well established principle of appellate review in both this Court and the Fifth Circuit that issues not raised in or considered by the court below will not be allowed on appeal. *E.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *Smith v. United States Parole Commission*, 752 F.2d 1056, 1057 n.1 (5th Cir. 1985); *Baker v. Estelle*, 711 F.2d 44, 45-46 (5th Cir. 1983). There are, to be sure, exceptions to this rule. For example, this Court has not hesitated "in the interests of judicial administration" to address an issue not raised in the courts below where the issue was important and recurring, where it had been fully briefed and where the respondent did not object to its determination by this Court. *Carlson v. Green*, 446 U.S. 14, 16 n.2 (1980). Similarly, the Fifth Circuit will consider new issues on

appeal which involve purely legal questions[3] when the failure to consider them would result in a miscarriage of justice. *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985); *United States v. Velasquez*, 748 F.2d 972, 973-74 (5th Cir. 1984).

The instant case fits into neither exception. Here, the new issues raised on appeal involve intensely factual matters which cannot be resolved without a hearing. Thus, the Fifth Circuit's consideration of these matters did not aid in the final disposition of this cause and can in no sense be said to further the orderly administration of justice. Quite to the contrary. Since Petty's new claims have not been presented to the state courts, as required by 28 U.S.C. § 2254(b), (c), amendment of his petition to include them will render it subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982) for failure to exhaust state remedies.[4] The Fifth Circuit's approach works to perpetuate this action in both the state and federal system. It thus disserves valid interests in the orderly administration of justice and, as discussed in Part II, *supra*, at 7-8, frustrates the screening process entrusted to the district courts by the habeas rules. The immense burden placed on the district courts by suits under 28 U.S.C. § 2254 has received considerable attention, and there are currently two bills pending in Congress which are designed to alleviate this problem, H.R. 1127 and S. 238. The Fifth Circuit's holding exacerbates the problem.

Further, to the extent the opinion implies that Petty was not afforded an opportunity to amend his petition in the district court, it is factually incorrect. The state's responsive pleading (the pertinent part of which is attached as Appendix B) and the magistrate's report and recommendation (attached as Exhibit C), specifically informed Petty that his allegation of a sixth amendment violation (attached as Exhibit A) was deficient.

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3. A question is purely legal if no facts could have been raised to develop the issue at an evidentiary hearing. *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976).

4. The Fifth Circuit's opinion opines that "[i]n the interests of efficiency and finality, . . . the state may prefer to waive this defense." *See* Appendix F at 5. There is nothing in the record to support this statement and the state assures this Court that is does not and will not waive Petty's non-exhaustion of state remedies.

Although put on ample notice, Petty did not correct this shortcoming in the district court and made no factual allegations in support of his sixth amendment claim until his case reached the Court of Appeals.

The Fifth Circuit's reasoning allowing consideration of those new claims creates an exception which swallows the rule. Is it not true that a party who raises new claims in a higher court invariably thus evinces a desire to "raise them in the district court if he were given the opportunity to do so"? Adherence to such a standard can have but one result: evisceration of the proscription against new issues on appeal. The "screening process" envisioned by the federal habeas rules is thus destroyed and the judgments of the district courts are robbed of their finality. Further, the habeas petitioner is afforded an unwarranted second opportunity to plead his case. If he is unable to prevail on his initial, conclusory allegations, he need only make additional allegations on appeal in order to obtain a remand with directions to allow him to amend.

B. *The result of the decision of the court below is to deny the state the opportunity to plead abuse of the writ under Rule 9(b), 28 U.S.C. fol. § 2254.*

The real mischief of the Fifth Circuit's holding, however, is that it works to unfairly deprive the state of the opportunity to plead the defense of abuse of the writ pursuant to Rule 9(b), 28 U.S.C. fol. § 2254. Rule 9(b) is designed to preclude vexations, piecemeal litigation of habeas claims. It provides that:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The state's entitlement to a Rule 9(b) dismissal depends on several factors, not the least of which is that the petitioner's prior application(s) be decided "on the merits." *See Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc), *cert. denied*, _____U.S._____, 104 S.Ct. 2356 (1984) ("dismissal of a

mixed petition [for failure to exhaust state remedies] does not create a hurdle of writ abuse on Petitioner's return.") Here, the claims raised in Petty's application in the district court were reviewed on the merits and rejected by that court. Had the court below followed the normal procedure and refused to consider issues raised for the first time on appeal, it simply would have affirmed the district court's denial of relief. Thus, in the event of a successive petition raising new claims, the state would have been able to plead abuse of the writ based on the merits review afforded Petty in the instant cause. This is not to say that a Rule 9(b) motion ultimately would succeed, or even that it would be appropriate.[5] Under such a disposition, however, the state would have had the option of pleading abuse of the writ in a subsequent proceeding.

By remanding to allow Petty to amend his petition to include allegations first made in the appellate court, the opinion unfairly deprives the state of its Rule 9(b) defense. Because there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus Rule 9(b) would not apply to Petty's amended petition.[6] By the same token, if Petty's amended petition is dismissed for failure to exhaust state remedies, the state is likewise deprived of its Rule 9(b) defense.

CONCLUSION

For these reasons, Petitioner prays that the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit issue and, as to the first question presented, that this cause be

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5. The district courts are free to review successive petitions where "the applicant shows that the ends of justice would be served by permitting redeterminations of the ground." *Sanders v. United States*, 373 U.S. 1, 16 (1963).

6. There is authority for the application of Rule 9(b) to an amended petition which raises new claims. *See Cody v. Missouri Board of Probation and Parole*, 468 F.Supp. 431, 434-35 (W.D. Mo. 1979). The state does not understand the law of the Fifth Circuit to be consistent with *Cody*, however, and as a practical matter it would be futile to plead abuse in the district court in response to an amended petition explicitly sanctioned by a higher court.

remanded to the Court of Appeals for reconsideration in light of *Hill v. Lockhart*, _____U.S._____, 106 S.Ct. 366 (1985).

Respectfully submitted,

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APPENDIX A

1. Ground one: *Denied effective assistance of Counsel.*

Supporting FACTS (tell your story briefly without citing names or law):

The fact of this case vividly illustrate legal representation utterly failing to meet minimal constitutional standards. Viewed most charitably the performance of my court-appointed attorney was at best perfuncorty. As a preliminary matter it should be plainly stated that explanation for the substandard performance of Counsel in my case; is self-evident from the record believing me to be guilty of the offense charge, she naturally assumed that I would eventually enter a plea of guilty to the indictment, thereby the obviating the necessity for a jury trial and the investigation and preparation necessary incident to it. When I persisted in denying my guilt and demanding a trial, Counsel was (So to speak) caught flatfooted and was therefore compelled to defend the accusation in a state of virtually total unpreparedness. Failure to interview prospective defense witnesses prior to trial all of these circumstances explain what happened as clearly and as persuasively as if Counsel had candidly admitted that she did not feel it necessary to devote to much time to the case of a man she believed to be obviously guilty.

Counsel only conferred with me one time before trial. This interview was only to receive a brief knowledge of the case, and too deliver the Assistant District Attorney's plea bargain deal. This discussion was directed toward me making a possible plea of guilty to the charge and further asking me, to consider the deal proposed by the State. Never was there a discussion of a possible defense and the address of my witnesses mentioned by Counsel.

Counsel neglected to explain the full legabity of the offense for which I was charged and indicted. Obviously the adequacy of a court-appointed attorney consultations with there client prior to trial cannot be evaluated simply in terms of the number of times or the length of there discussions. On the other hand, where (as here) a criminal defendant is facing the possibility

of fifty (50) years which I ultimately received, and persistently maintains my innocence, there must certainly be a corresponding greater obigation on the part of an attorney in preparing for trial to assure thereself that they are thoroughly fimiliar both with the facts of the case from the State's perspective and the defendants version of those facts. Certainly, an attorney cannot render reasonably effective assistance unless they have acquated themself with the law and facts of the case.

APPENDIX B

(1) Petitioner contends that he was denied effective assistance of counsel. Respondent denies this allegation. Petitioner alleges that counsel failed to interview prospective defense witnesses, only conferred with Petitioner one time before trial, did not discuss with Petitioner possible defenses or possible witnesses, and was totally unprepared for trial. Petitioner was not entitled to perfect counsel nor is counsel to be judged by hindsight. Petitioner was only entitled to counsel reasonably likely to render and rendering reasonably effective assistance, and whether Petitioner received reasonable effective assistance is determined from a review of the totality of the representation furnished. *See Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir. 1981); *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960). To prevail, Petitioner must also demonstate an identifiable lapse on the part of counsel and some actual, adverse impact upon the fairness of his trial resulting from such lapse, and mere conclusory allegations are insufficient to demonstrate ineffectiveness of counsel. *See Blackledge v. Allison*, 431 U.S. 63, 75-76 (1976); *Rubio v. Estelle*, 689 F.2d 533 (5th Cir. 1982); *Sneed v. Blackburn*, 569 F.2d 854 (5th Cir. 1978); *Bryan v. Elliott*, 472 F.2d 572 (5th Cir. 1973).

Petitioner does not allege what pretrial investigation should have been conducted by counsel that was not conducted or how his defense would have been materially benefitted by any additional investigation by counsel; Petitioner does not allege what witnesses should have been interviewed by counsel that were not, does not allege what those witnesses would have testified to that would have been material to any defense of Petitioner, or that those witnesses would have in fact testified or that their testimony would have been admissible. Petitioner concedes in his petition that counsel did confer with Petitioner to receive a knowledge of the case, but Petitioner does not demonstrate how additional conferences would have benefitted counsel or any defense of Petitioner.

A review of the state records also reflects that counsel was appointed to represent Petitioner approximately two months

prior to Petitioner's trial. It also appears that this same counsel had been appointed to represent Petitioner in another case in Cause in Cause No. 18594, 99th District Court, Lubbock County, Texas, on application for revocation of probation. It also appears that in Petitioner's present conviction another counsel also assisted petitioner's appointed counsel. The records reflect that Petitioner's counsel thoroughly voir dired the prospective jurors to obtain a fair and impartial jury, fully cross-examined the witnesses for the state which indictated that counsel was familiar with the facts and the law involved in this case, made reasonable objections to testimony and evidence, many of which were sustained, and made final jury argument. A review of the totality of the representation furnished to Petitioner by his counsel clearly shows that counsel loyally and competently represented Petitioner.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

GREGORY ALLEN PETTY,	§	
	§	
PETITIONER	§	
	§	
VS.	§	CA5-84-34
	§	
D.V. McKASKLE,	§	
DIRECTOR	§	
TEXAS DEPT. OF	§	
CORRECTIONS,	§	
	§	
RESPONDENT	§	

REPORT AND RECOMMENDATION

Petitioner, Gregory Allen Petty, is a state prisoner by virtue of judgment and sentence of the 99th District Court of Lubbock County, Texas, in cause number 19914. He was found guilty after jury trial under an indictment charging him with the felony offense of aggravated robbery and on the 20th day of September, 1979, the trial judge sentenced him to serve an indeterminate term of not less than five years nor more than fifty years in Texas Department of Corrections. The Texas Court of Criminal Appeals affirmed the conviction by its per curiam opinion delivered April 27, 1983.

Petitioner has filed application for writ of habeas corpus pursuant to 28 United States Code §2241 et seq. and is proceeding *in forma pauperis.* Liberally construing his *pro se* pleadings he contends that (1) he was denied effective assistance of counsel; (2) the indictment was fundamenally defective; (3) the evidence was insufficient to support the conviction for aggravated robbery; (4) the state failed to prove beyond a reasonable doubt that the knife used in commission of the robbery was a deadly weapon; (5) he was forced to incriminate himself when he was required to stand and open his mouth;

and (6) the "in court" identification was tainted with an impermissibly suggestive pretrial identification.

The state court record, consisting of the statement of facts of the trial, the transcript of all state court proceedings, the briefs on appeal, and the comprehensive opinion of the Texas Court of Criminal Appeals, has been filed in this case. The latter four challenges advanced in the petition before this court had been raised by petitioner on direct appeal. Also the Court of Criminal Appeals had discussed in its opinion the contention by petitioner in his pro se brief that the indictment was fundamentally defective on bases other than those which he has raised in this application for habeas relief. After those challenges had been rejected by the appellate court petitioner filed application for writ of habeas corpus in the trial court, contending that he had been denied effective assistance of counsel and that the indictment was fundamenally defective on the same bases as those which he has raised in the application before this Court. The trial judge filed findings of fact and conclusions of law on August 3, 1983, and the Court of Criminal Appeals denied the application without written order on October 5, 1983. Petitioner has substantially exhausted available state remedies.

A summary of the facts developed at the trial will be helpful to this memorandum. The evidence adduced at trial reflects that the complaining witness, a thirty-seven year old female, was walking home from a Tupperware party late in the evening on May 29, 1979. As she was bending down to remove a stone from her shoe, petitioner approached her, struck up a conversation with her, and began walking with her. They walked together for approximately five minutes until the complaining witness turned east on another street and left petitioner. After she had walked on that new street for a few minutes she heard a noise and, looking around, she noticed that petitioner again was behind her. Petitioner asked her to take her clothes off and when she refused he grabbed her, pulled a knife, and threatened to cut her throat. She testified that petitioner grabbed her blouse and tore it. Further, while still holding the knife, petitioner attempted to take her pants off. At that point she sat down in the middle of the street to make it more difficult for petitioner. Petitioner put the knife in his pocket, grabbed her

purse, and ran. The complaining witness went to a friend's house which was located nearby and telephoned the police. Two police cars came in response to her call. While she was giving a statement to an officer in one car, the officers in the other car drove off to search the area. A few minutes later those officers called to say that they had detained a suspect. Petitioner identified the suspect as her attacker. In a search of his motel room the purse belonging to the complaining witness was discovered.

The first challenge advanced by petitioner is to the effectiveness of the attorney who had been appointed to represent him. Petitioner contends that the performance by the attorney was, at best, perfunctory, that she had conferred with him only one time prior to trial and on that occasion she attempted to persuade him to plead guilty and she was unprepared for jury trial, and that she failed to interview prospective defense witnesses.

A habeas corpus petitioner has the burden to demonstrate by sufficient factual allegation and proof an identifiable lapse on the part of counsel as well as some actual adverse impact upon the fairness of his trial which results from that lapse. *Boyd v. Estelle*, 661 F2d 388 (5th Cir. 1981); *Washington v. Watkins*, 655 F2d 1346 (5th Cir. 1981). In this case petitioner has not met that burden. Although he contends that the attorney failed to interview prospective defense witnesses and failed to prepare for trial, he has not identified any witnesses who should have been interviewed by the attorney nor has he identified any trial preparation or investigation which the attorney should have made but failed to do. Further, he has not demonstrated any actual adverse impact upon the fairness of his trial which resulted from those claimed deficiencies. Review of the record of the trial reflects that the attorney had examined the jury panel on voir dire and had selected a jury. She cross-examined witnesses and she made an argument to the jury. The "in court" identification by the complaining witness of petitioner as her attacker was positive and the facts with which the attorney had to operate restricted possible defenses. The determination of whether an accused received reasonably effective assistance of counsel is predicated upon the entire record and the totality of the circumstances surrounding the trial performance.

Washington v. Estelle, 648 F2d 276 (5th Cir. 1981). When the entire record is viewed the representation afforded by appointed counsel was well within the standard of *MacKenn v. Ellis*, 280 F2d 592, 599 (5th Cir. 1960) wherein the Fifth Circuit defined the constitutional standard as not being errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and actually rendering reasonably effective assistance.

On direct appeal petitioner, by his pro se brief, had contended that the indictment was fundamentally defective when it failed to allege that petitioner committed theft "with the intent to obtain and maintain control of property." Petitioner now contends that the indictment was fundamentally defective when it failed to allege that the complaining witness was the owner of the United States currency that allegedly was taken in the robbery and when it failed to allege that she had a greater right to the currency than did petitioner. Those challenges must fail for a number of reasons.

The indictment, in pertinent part, alleged that petitioner "...did then and there while in the course of committing theft and with intent to appropriate property of Edna Faye Mars, to-wit: good and lawful United States currency without the effective consent of the said Edna Faye Mars and with intent to deprive the said Edna Faye Mars of said property, did then and there by using and exhibiting a deadly weapon, to-wit: a knife, that in the manner of its use and intended use was capable of causing death and serious bodily injury, intentionally and knowingly placed the said Edna Faye Mars in fear of imminent bodily injury..."

As a threshold matter no pretrial or trial objection to the indictment was advanced. Under Texas law the failure to file motion to quash the indictment constitutes waiver. *Vaughn v. State*, 530 SW2d 558 (Tex. Crim. 1975). That procedural default bars federal habeas review of the merits, absent showing of "cause" for and "prejudice" by the default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Further, the sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction. *Branch v. Estelle*, 631 F2d

1229, 1233 (5th Cir. 1980). Although an indictment must allege each and every essential element of an offense to pass constitutional muster the law does not compel a ritual of words. The validity of an indictment is governed by practical, not technical, considerations and must be read as a whole to determine its meaning. An indictment is sufficient if it contains the elements of the offense charged and fairly informs the accused of the charge against which he must defend and if it enables him to plead acquittal or conviction in bar of future prosecutions for the same offense.

In this case the challenges advanced by petitioner are frivolous. The Court of Criminal Appeals, in its analysis of the indictment, found that petitioner's contention that the indictment did not allege that petitioner committed theft "with the intent to obtain and maintain control of property" should be rejected because the intent to appropriate, which was alleged, is the same as the intent to obtain or maintain control of property. In the application before this Court petitioner contends that there was no allegation that Edna Faye Mars was the owner of the United States Currency nor that she had any greater right to it than did he. Those contentions are belied by the allegations in the indictment. The indictment challenged that petitioner "... while in the course of committing theft and *with intent to appropriate property of Edna Faye Mars, to-wit: good and lawful United States currency* without the effective consent of the said Edna Faye Mars and *with intent to deprive the said Edna Faye Mars of said property,....*" (emphasis added) The allegations in the indictment clearly shows that the money which was taken in the robbery was property that belonged to the complaining witness.

The third challenge advanced by petitioner in this complaint is that the evidence was insufficient to support the conviction of aggravated robbery because the state failed to prove that petitioner used or exhibited a deadly weapon during the commission of the robbery. That challenge should be considered together with his fourth contention....that the state failed to prove beyond a reasonable doubt that the knife used in commission of the robbery was a deadly weapon. The Texas Court of Criminal Appeals, in its comprehensive opinion, noted that petitioner had stuck the complaining witness in the throat with

his knife. The complaining witness had described the knife as being a "regular sized pocket knife" with a dull tip and stated that because of the dull tip the knife did not cut her skin when she was stuck with it. However, during the entire episode petitioner held his knife at her throat. The Court of Criminal Appeals found that from the manner and intent of its use the evidence was established to support the conclusion that the knife was a deadly weapon. That finding by the appellate court is supported by the factual record, is not clearly erroneous, and, since petitioner has demonstrated no exception to presumption of correctness, the findings should be adopted by this Court. *See Sumner v. Mata*, 449 U.S. 539 (1981).

The Texas Court of Criminal Appeals also had rejected petitioner's contentions that he was forced to incriminate himself and that the "in court" identification was tainted with an impermissibly suggestive pretrial identification. However, that court based its rejection on the fact that no objection had been made at the time of trial and therefore nothing was preserved for review. Although that procedural default could prevent this court from reaching the merits of the challenges absent showing of "cause" and "prejudice" those merits will be addressed by this memorandum.

During the trial complaining witness described the clothing worn by her assailant. When the prosecutor asked her whether there was anything about his physical characteristics that she noticed she testified that "he had some teeth missing." The prosecutor requested that petitioner stand and open his mouth. He complied with that request. When the prosecutor asked the complaining witness whether petitioner's mouth was "that way" on the night of the robbery she testified "I don't believe he had any of these on the bottom missing. He had some on top missing."[1] The condition of petitioner's teeth is a physical characteristic which is outside the protection of the Fifth Amendment. Petitioner was not denied his constitutional rights against self-incrimination when he responded to the request

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1. During the punishment phase of the trial petitioner testified that he had been assaulted by fellow prisoners in the jail and, among other injuries, some of his teeth were knocked out.

by the prosecutor to open his mouth in order that the condition of his teeth could be observed by the complaining witness.

Petitioner's challenge to the pretrial identification is based upon his contention that the complaining witness had identified him on the night of the arrest when he was in the lobby of his motel and the complaining witness observed him from outside through the display window. At that time the only persons in the lobby of the motel other than petitioner, a white man, were two police officers and a black porter. He contends that under those circusmtances the complaining witness had no alternative but to identify him as the assailant. However, when petitioner first approached the complaining witness on the night of the assault he was very near a street light and the complaining witness testified that she had a clear view of him. Also the night was moonlit. Further, petitioner struck up a conversation with her and walked with her for approximately five minutes. They separated and later he again approached petitioner. On those two occasions when petitioner was in contact with the complaining witness the complaining witness had ample opportunity to observe petitioner, his physical characteristics and appearance, and his clothing. She had given a full and complete description of petitioner's physical appearance and clothing to the police officers who arrested petitioner as a suspect. Her "in court" identification of petitioner was clear, positive, and unchallenged.

The first inquiry the court should make is whether the identification procedure was unnecessarily suggestive. A finding of impermissible suggestiveness raises concern over the reliability of the identification and triggers close scrutiny to determine whether the procedure created the substantial risk of misidentification. However, the linchpin of due process analysis is the the reliability of the in court identification. Assume, without finding, that the identification procedures on the night of the arrest, were "suggestive." As noted above the "in court" identification was clear, positive and unchallenged. The "in court" identification far more than overbalances any corrupting influence of the identification in the motel soon after the incident which might be conducive to irreparable mistaken identification.

None of the challenges advanced by petitioner entitle him to habeas relief. I recommend that the application for writ of habeas corpus be denied.

The Clerk is directed to file this Report and Recommendation and to send a copy of it to petitioner and a copy to the attorney for respondent. Any party may object to the proposed findings and to the recommendation within ten days after having been served with a copy hereof. Such party shall file with the Clerk of the Court, and serve on the Magistrate and on all parties, written objections which shall specifically identify the portions of the findings, recommendation, or report to which objection is made and shall set out fully the basis for each such objection. Failure to timely file written objections to the proposed findings and recommendation contained in this report shall bar an aggrieved party from attacking the factual findings on appeal. *See Nettles v. Wainwright*, 677 F2d 404, 408 (5th Cir. 1982)(en banc).

Recommended this 23rd day of April, 1984.

/s/ Bill H. Brister
UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY,	§	
	§	
PETITIONER	§	
	§	
VS.	§	**CA5-84-34**
	§	
D.V. McKASKLE, DIRECTOR, TEXAS DEPT. OF CORRECTIONS	§	
	§	
RESPONDENT	§	

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

This Court has considered the Report and Recommendation filed by the United States Magistrate on April 24, 1984. The Court has independently reviewed the pleadings, the statement of facts of an the trial, the briefs on appeal, the appellate opinion, and the transcript of all state court proceedings.

The findings of the Magistrate are supported by the record and this Court adopts those findings and the recommendation to deny the application for writ of habeas corpus.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk is directed to file this order and to mail a copy of the order and of the Report and Recommendation of the United States Magistrate to petitioner, a copy of each to the attorneys for respondent, and a copy of each to the presiding judge of the 99th District Court of Lubbock County, Texas.

Entered this 14th day of May, 1984.

/s/ Halbert O. Woodward

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY,	§	
	§	
PETITIONER	§	
	§	
VS.	§	CA5-84-34
	§	
D.V. McKASKLE,	§	
DIRECTOR,	§	
TEXAS DEPT. OF	§	
CORRECTIONS	§	
	§	
RESPONDENT	§	

JUDGMENT

The Court has this day entered order entitled Order Denying Application for Writ of Habeas Corpus.

It is, therefore, ORDERED, ADJUDGED and DECREED that the application for writ of habeas corpus filed by Gregory Allen Petty be, and it is hereby, denied and dismissed.

The Clerk is directed to file this judgment and to mail a copy of the judgment to petitioner, a copy to the attorneys for respondent, and a copy to the presiding judge of the 99thd District Corut of Lubbock County, Texas.

Entered this 14th day of May, 1984.

/s/ Halbert O. Woodward
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Gregory Allen Petty,
Petitioner-Appellant,

V.

No. 84-1488
Summary Calendar

O.L. McCotter, Director, Texas Department of Corrections,
Respondent-Appellee.

OPINION

Filed January 3, 1986

Before: Alvin B. Rubin, Sam D. Johnson, and Edith H. Jones, Circuit Judges.

Opinion by Judge Alvin B. Rubin

Appeal from the United States District Court for the Northern District of Texas Halbert O. Woodward, Chief District Judge, Presiding

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SUMMARY

Criminal Procedure

Appeal from dismissal of petition for writ of habeas corpus. Reversed and remanded.

Petty seeks a writ of habeas corpus on the ground that his trial counsel was ineffective. His claim was dismissed by the district court without an evidentiary hearing because he failed to allege that he had suffered any specific prejudice as a result of his counsel's actions. He now contends his counsel's inadequate preparation and her failure to raise an insanity defense constituted ineffective assistance.

[1] Petty's contention that his counsel's failure to investigate a potential defense to his identification as the perpetrator of the crime constituted ineffective assistance fails. It does not

reflect the necessary prejudice, that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. [2] Petty's identification was firmly established by other evidence not undermined by his potential defense.

[3] If Petty had rasied the insanity defense issue in district court, he would have been entitled to an evidentiary hearing to determine whether counsel's failure to investigate his mental capacity resulted in the failure to present a valid defense of insanity. [4] Petty, as a pro se petitioner, should be given an opportunity to amend his pleading in district court to assert what he now contends. [5] Although Petty raised his claim of ineffective assistance of counsel in state court and exhausted his state remedies, he did not htere assert the factual basis of his present claim that counsel failed to investigate a defense basis of his present claim that counsel failed to investigate a defense of insanity. When the claim presented in federal court is based on significantly different underlying facts, state remedies have not been exhausted and on remand the state may raise that defense in an amended answer to Petty's amended pleadings.

OPINION

ALVIN B. RUBIN, Circuit Judge:

Gregory Allen Petty, a state prisoner convicted of aggravated robbery, seeks a writ of habeas corpus on the ground that his counsel at the trial was ineffective. Without an evidentiary hearing, the district court dismissed this claim because Petty failed to allege that he suffered any specific prejudice as a result of his counsel's actions. On appeal, Petty sets out facts that suggest possible prejudice. Although we are unable to consider these allegations, because they are made for the first time on appeal, we reverse and remand this case to the district court, with instructions that Petty be permitted to amend his complaint to allege the facts now asserted.

Petty contends that he received ineffective assistance of counsel both because of his lawyer's inadequate preparation an because of her failure to assert the defense of insanity. We consider these contentions separately.

I.

Petty asserts that his trial counsel conferred with him only twice before trial, obtained only a brief knowledge of the case, never discussed possible defenses with him, failed to interview prospective defense witnesses, and was entirely unprepared for trial because she assumed that he would plead guilty.

In his pro se appellate brief, Petty for the first time attempts to specify how he was prejudiced by these actions. At trial, the complaining witness testified that Petty approached her on the street, held a pocket knife to her throat and, failing in an attempt to rape her, grabbed her purse and ran away. The victim went to the nearby home of a friend and called the police, giving a description of her assailant. After about twenty minutes, the police told her that they had found a suspect. The victim was taken to a motel near the scene of the incident where, from the police car, she identified Petty standing in the lobby, twelve to fourteen feet away, with two policemen and a motel clerk. She told the police that he looked like her attacker, and "if he has any teeth missing there would be no doubt."

In court, Petty stood and opened his mouth to show a number of missing teeth. Asked if that was how his mouth looked during the robbery, the victim replied "I don't believe he had any of these on the bottom missing. He had some on top missing." Petty asserts that his teeth were not missing until after his arrest, when they were later knocked out as a result of two assaults upon him in the county jail. Petty thus asserts, for the first time on appeal, that counsel failed to investigate this defense by interviewing potential witnesses, or by seeking out medical records and disciplinary reports, that would confirm that his teeth were knocked out after his arrest.

[1] This contention is without merit, for is does not reflect prejudice of the degree required by *Strickland v. Washington*.[1] In order to prevail on a claim of ineffective assistance of counsel, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional

1. _____U.S._____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

errors, the result of the proceeding would have been different.'[2] The errors of counsel must call into question the fundamental fairness of the conviction.

[2] In this case, the identification of Petty was firmly established by other evidence. The victim testified that she saw him clearly when she spoke with him directly under a street light and walked alongside him for five or six minutes. Her identification of him was certain and unqualified. His clothing fit the description she had given the police, and her purse was found in his motel room. Even though Petty may have suffered later injuries to his teeth, he admitted that his teeth had been badly decayed and might have appeared to be missing. The arresting officer testified at trial that Petty was missing a tooth at the time of his arrest. In the face of this evidence, it is not probable that testimony about Petty losing one or more of his teeth while in custody would have led to a different verdict.

II.

[3] Also for the first time on appeal, Petty asserts that his trial attorney failed to investigate the possible defense of insanity. He claims, among other grounds, that he has been committed to mental institutions on three separate occasions and has undergone outpatient psychiatric care for a number of years. He asserts that he was denied the opportunity to present evidence bearing on his degree of responsibility at the time of the offense and at the time of trial. No evidentiary hearing was held in state court. Had Petty raised this issue in the district court, he would have been entitled to an evidentiary hearing to determine whether counsel's failure to investigate his mental capacity resulted in the failure to present a valid defense of insanity.[3]

[4] We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations, however, indicates that he would raise them in the district court if he were given the

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2. *Id.* at _____, 104 S.Ct. at 2068, 80 L.Ed.2d at 697.

3. *See Johnson v. Estelle*, 704 F.2d 232, 239-40 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1006 (1984); *Clark v. Blackburn*, 619 F.2d 431 (5th Cir. 1980).

opportunity to do so. Therefore, even if a pro se petitioner is required to allege the specific prejudice that he must eventually prove. Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

[5] Although Petty raised his claim of ineffective assistance of counsel in state court and exhausted his state remedies, he did not there assert the factual basis of his present claim that counsel failed to investigate a defense of insanity. We have held that, when the claim presented in federal court is based on significantly different underlying facts, state remedies have not been exhauseted. *Burns v. Estelle*, 695 F.2d 847, 849-50 (5th Cir. 1983). If Petty amends his pleadings on remand, then the state, if it so chooses, should be permitted to raise this defense by amending its answer. Any dismissal that results from failure to exhaust state remedies would be without prejudice, leaving Petty free to return to federal court after seeking relief from the state. In the interests of efficiency and finality, therefore, the state may prefer to waive this defense.

The most efficient resolution of this appeal would be to remand for an evidentiary hearing without the formality of requiring that pleadings be amended to allege what is already set out in the briefs before this court. *Strickland* requires that prejudice be proved, not pleaded. To remand for a hearing, however, would prevent the state from asserting the defense of nonexhaustion of state remedies because the underlying facts are different. In the future, the hearing of habeas corpus matters may be facilitated if the district courts modify the standard forms provided to pro se petitioners to require that, when the petitioner alleges ineffectiveness of counsel, he also describe the prejudice allegedly suffered. This would then enable the state directly to raise, or to waive, the petitioner's failure to exhaust state remedies.

For the reasons given, the dismissal is REVERSED, and the case is REMANDED with instructions to the district court to permit Pety to amend his complaint, to permit the state to amend its answer, and then to conduct such further proceedings as may be appropriate and consistent with this opinion.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1488

GREGORY ALLEN PETTY,
Petitioner-Appellant

versus

O.L. McCOTTER, Director,
Texas Departmetn of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 3, 5 Cir., 1986, _____F.2d_____)
(March 4, 1986)

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federa Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin

United States Circuit Judge